

1803597 (Migration) [2019] AATA 508 (22 January 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1803597
MEMBER:	Hugh Sanderson
DATE:	22 January 2019
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211 of Schedule 2 to the Regulations; and • cl.309.221 of Schedule 2 to the Regulations.

Statement made on 22 January 2019 at 9:34am

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine and continuing relationship – arranged marriage – living in separate countries – little time spent together – validly married for 6 years – visa applicant living with spouse’s parents – local custom – continuing financial support – intention to live together permanently – decision under review remitted
1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 309.211, 309.221

CASES

He v MIBP [2017] FCAFC 206

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 29 December 2017 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
3. The visa applicant applied for the visa on 27 June 2016 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211(2) and cl.309.221 because the delegate was not satisfied the visa applicant was the spouse, as defined in s.5F of the Act, of the review applicant.

Background

5. The review applicant was born in Pakistan and is currently [age] years old. He first entered Australia [in] March 2013 and was granted a [Protection] visa on 23 September 2013. He became an Australian citizen in June 2017. The visa applicant is a citizen of Pakistan and is currently [age] years old.
6. The families of the parties arranged to meet each other and the parties were introduced to each other on 1 February 2013. They agreed to marry each other and were married in Pakistan [later in] February 2013. A copy of marriage certificate has been provided to the Department. In his Protection visa application, the review applicant identified the visa applicant as his wife.
7. After the review applicant arrived in Australia, it was claimed that the parties communicated with each other over Skype and by sending text messages. On occasions, the review applicant sent money to the visa applicant. The parties were interviewed by an officer from the Department.
8. The delegate who considered the application noted the following issues:
 - Evidence had been provided of the review applicant sending some money to the visa applicant;
 - The parties had spent little time with each other in the same country and there was no evidence that the parties had ever established a household together;
 - Although the parties provided evidence of the Nikkah ceremony having occurred, there was no evidence to show the Rukhsati ceremony had taken place;
 - Photographs of the weddings had been provided which was the only time the parties appeared to have been together;
 - There were no statements in support of the application by relatives of the parties residing in Pakistan;
 - The parties knew each other for only a very short time prior to the marriage and have had little physical contact after their marriage;

- The parties could have organised to meet in a third country, however, the only reason given by the parties why this had not happened was that it was not financially possible;
 - Despite having being granted Australian citizenship in June 2017 the review applicant had not travelled to see the visa applicant and did not plan to accompany her to Australia if she were granted a visa; and
 - There was little evidence of any plans for their future together.
9. Taking these matters into account, the delegate was not satisfied that the visa applicant was the spouse of the review applicant as defined in s.5F of the Act. The delegate found that the applicant did not meet the criteria in cl.309.211 and cl.309.221 and refused the application.

Information to the Tribunal

10. The review applicant's movement records show that he travelled out of Australia, leaving [in] February 2018 and returning [in] April 2018.
11. The review applicant provided further information to the Tribunal including the following:
- Statement of the review applicant;
 - Two statements from people in Pakistan claiming they believe the relationship is genuine;
 - Evidence of money being sent by the review applicant visa applicant;
 - Internet chat records; and
 - Photos of the parties.
12. The review applicant appeared before the Tribunal on 21 January 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the review applicant's brother and his wife, and the visa applicant. The review applicant was represented in relation to the review by his registered migration agent.
13. All the witnesses gave consistent information as to various aspects of the relationship between the parties. This included details of how they were first introduced, their financial arrangements, the various social activities they had participated in, their plans for the future together and aspects of each other's families lives. The evidence given by the parties was done so in a straightforward and credible manner.
14. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

15. The issue in the present case is whether the visa applicant is the spouse, as defined in s.5F of the Act, of the review applicant.

Whether the parties are in a spouse or de facto relationship

16. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who, at the time of the application, had the right to reside permanently in Australia and is now an Australian citizen.
17. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP*[2017] FCAFC 206.

Are the parties validly married?

18. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties were married in Pakistan [in] February 2013. There is nothing to indicate the marriage between the parties is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

Financial aspects

19. The parties live in separate countries and neither have any significant assets of their own. It is not surprising, therefore, that the parties do not have any joint assets or shared savings. The review applicant has been sending money to his parents and to the visa applicant for their financial support. The review applicant's parents do not work and it is likely that he would continue to provide financial assistance to them, regardless of his relationship with the visa applicant. The visa applicant is living with the review applicant's parents and has access to the financial support he is providing to them and also directly to her. The funds the review applicant provides to his parents and to the visa applicant are to meet their day-to-day household expenses.
20. Although limited, the Tribunal finds that the financial arrangements of the parties supports a finding that the parties are in a genuine and continuing relationship. The review applicant has provided continuing financial support for the members of his family who remain living in Pakistan which includes the visa applicant.

Household

21. As the parties live in separate countries, there is little information that the parties have ever established a household together or that their living arrangements are indicative of a genuine and continuing relationship. The visa applicant currently primarily lives with the review applicant's parents in Quetta. She still stays occasionally with her own parents who live nearby to the review applicant's parents.
22. The fact that she is living in the home of the parents of the review applicant is in accordance with the local custom and supports a finding that the parties are in a genuine and continuing relationship and that the relationship is recognised by their families as exclusive. The review applicant has travelled to Quetta on one occasion since he arrived in Australia. The Tribunal accepts that he stayed with the visa applicant in his parent's home.
23. Although limited, the Tribunal finds that the household arrangements of the parties support a finding that they are in a genuine and continuing relationship and have a mutual commitment to a shared life as husband and wife to the exclusion of all others. For the limited time the parties have been physically together they have lived together in the home of the review applicant's parents and the fact that the visa applicant is living there and moved into that home after the marriage is in accordance with the custom of the area.

Social aspects

24. The parties participated in a religious wedding ceremony in Pakistan prior to the review applicant travelling to Australia. On the one occasion the review applicant has been able to return to Quetta the parties were seen together as a married couple when they attended the wedding of the review applicant's sister. Photos have been provided of the parties together with their extended family members.
25. Statements have been provided by relatives of the parties acknowledging the relationship between the visa applicant and the review applicant. Evidence was given by the review applicant's brother and his wife in support of the application. The information provided was consistent as to the activities the parties have participated in together as well as the basis of how the parties first met each other.
26. The Tribunal finds that the parties have represented themselves to their families in Pakistan as being in a married relationship and that this relationship is recognised by their relatives both in Pakistan and in Australia. The fact that the visa applicant has moved into the home of the review applicant's parents is a clear indication that her marriage to the visa applicant has been publicly declared in Quetta and that their relationship is accepted as genuine. The review applicant has plans to return to Quetta to be able to spend time with the visa applicant and hopefully accompany her to Australia. All this information supports a finding that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others and that the relationship is genuine and continuing.

Commitment to each other

27. The parties were first introduced to each other on 1 February 2013 on the basis of being a suitable couple. The person who initiated the contact was the review applicant's sister who was a friend of the visa applicant. The parties were married [later in] February 2013. The fact that it was an arranged marriage is not uncommon in Pakistan. They have now been married for almost 6 years.
28. The review applicant, at that time, had been granted a [Student] visa to be able to enter Australia. The visa applicant was aware that the review applicant would be travelling to

Australia and hopefully be able to obtain a visa to live in Australia. It was her belief that the review applicant would be able to then sponsor her for a Partner visa after he was granted the right to reside in Australia. It appears that one of the factors which made the review applicant an attractive partner to the visa applicant and her family was that he was taking steps to be able to live in Australia.

29. The review applicant was not able to return to Pakistan until after he became an Australian citizen. The Tribunal accepts that due to the financial cost that would be incurred by both the applicant and the sponsor in travelling to a third country to spend time together it was not considered financially viable. It would also be practically difficult for the visa applicant to travel by herself to any third country.
30. After becoming an Australian citizen, the review applicant travelled to Quetta to be able to spend time with the visa applicant and also attend his sister's wedding. He has plans to return to Pakistan at the end of February 2019 to again spend time with the visa applicant.
31. The parties provided consistent information as to various aspects of their lives and their future plans together. This included details of the work that the visa applicant intends to become qualified in, where they intended to live, and plans for a family together. The information they provided of each other's lives indicated they were regular communication with each other and had spoken about personal aspects of their lives including their plans for the future. This indicated that the parties provide each other the degree of companionship and emotional support which would be expected in a genuine relationship and that they consider their relationship as long-term.
32. The Tribunal finds that the commitment the parties have shown to each other and their relationship indicates they intend to live together, that they have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that their relationship is genuine and continuing.
33. The Tribunal has considered all the circumstances of the parties' relationship both individually and innovatively. The parties were married after having only met each other for less than two weeks. In the cultural traditions of the parties this is not unusual. The parties were aware that the review applicant was planning to leave Pakistan soon after their marriage and to apply to live in Australia. This was confirmed by the visa applicant at the hearing and is consistent with the information provided by the review applicant in his Protection visa application. It was anticipated that would be a lengthy separation between the time the review applicant departed Pakistan and when the visa applicant would be allowed to enter Australia. Despite this period proving longer than the parties anticipated, they have continued to show a commitment to their relationship.
34. Overall, the Tribunal is satisfied that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others and that their relationship is genuine and continuing. Although they currently live separately and apart, this is not on a permanent basis and they intend to live together permanently as soon as the visa applicant is allowed to enter Australia.
35. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
36. Therefore the visa applicant meets cl.309.211 and cl.309.221.
37. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

38. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211 of Schedule 2 to the Regulations; and
 - cl.309.221 of Schedule 2 to the Regulations.

Hugh Sanderson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).